SEP 1 1970

In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 62

WILLIAM M. GILDAY, JR.,
PETITIONER,

v.

PALMER C. SCAFATI,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

FRANCIS J. DIMENTO
DIMENTO & SULLIVAN
100 State Street
Boston, Massachusetts 02109

Of Counsel:
DANIEL F. FEATHERSTON, JR.
7 Water Street
Boston, Massachusetts 02109

Blanchard Press, Inc., Boston, Mass. — Law Printers

INDEX

	Page
Citations To Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Or Statutory Provisions Involved	4
Statement Of The Case	4
Reasons For Granting The Writ	8
Conclusion	13
Appendix A -- Opinions Below	14
District Court	14
Circuit Court	55
Appendix B -- Constitutional Provisions	64

TABLE OF CITATIONS

Cases

Beto v. Stacks, 408 F. 2d 313 (5th Cir. 1969)	9

Page

Bowie v. Beto, 416 F. 2d 968 (5th Cir. 1969) 9

Bruton v. United States, 391 U.S. 123 (1968) 11

Burgett v. Texas, 389 U.S. 109 (1967) 5,8,9,10

Chapman v. California, 386 U.S. 18 (1967) 6,11,12,13

Commonwealth v. Bowlen, 351 Mass. 655 (1967), cert. denied, sub nom. Gilday v. Massachusetts, 389 U.S. 916, rehearing denied, 389 U.S. 1010 (1967) 5

Ex Parte Allen, 452 S.W. 2d 472 (Tex. Crim. App. 1970) 10

Ex Parte Bryan, 442 S.W. 2d 371 (Tex. Crim. App. 1969) 10

Gerberding v. State, 448 S.W. 2d 904 (Mo. 1970) 10

Gilday v. Commonwealth, ___ Mass. ___, 247 N.E. 2d 396 (1969) 6,10

Graham v. State, 462 P. 2d 309 (Okla. Crim. 1969) 10

Page

Green v. State, ___ Me. ___, 237 A. 2d 409 (1968) 10

Hamilton v. Alabama, 368 U.S. 52 (1961) 11

Harrington v. California, 395 U.S. 250 (1969) 11,13

In re Dabney, 71 A.C. 1, 76 Cal. Rptr. 636, 452 P. 2d 924 (1969) 10

Johnson v. State, ___ Md. ___, 263 A. 2d 232 (1970) 8,10

Losieau v. Sigler, 406 F. 2d 795 (8th Cir. 1969) 11

Oswald v. Crouse, 420 F. 2d 373 (10th Cir. 1970) 9,11

People v. Coffey, 67 Cal. 2d 204, 60 Cal. Rptr. 457, 430 P. 2d 15 (1967) 10

Shorter v. United States, 412 F. 2d 428 (9th Cir. 1969) 10

Sibron v. New York, 392 U.S. 40 (1968) 11

State v. Cameron, ___ Iowa ___, 167 N.W. 2d 689 (1969) 10

Page

State v. G.L., 108 N.J. Super 186 260 A.2d 513 (1969) 10

Tucker v. Craven, 421 F.2d 139 (9th Cir.) cert. denied, sub nom. Craven v. Tucker, 38 U.S.L.W. 3465 (May 26 1970) 9,11

Tucker v. United States, 299 F. Supp. 1376 (N.D. Calif. 1969) 10

United States ex rel. Bolish v. Maroney, 409 F.2d 1404 (3d Cir. 1969) 9

United States v. Martinez, 413 F.2d 61 (7th Cir. 1969) 9

White v. Maryland, 373 U.S. 59 (1963) 11

Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968) 11

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No.

WILLIAM M. GILDAY, JR.,
Petitioner,

v.

PALMER C. SCAFATI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled cause on June 24, 1970.

CITATIONS TO OPINIONS BELOW

The memorandum opinion in the United States District Court for the District of Massachusetts is unreported, and the opinion of the United States Court of Appeals for the First Circuit has not as yet been reported, but both are printed in Appendix A hereto, infra, ps. 14 - 63.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on June 24, 1970, and the court ordered a stay of its mandate until August 31, 1970, to permit the filing of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

QUESTIONS PRESENTED

1. Was it harmless error to impeach

petitioner's criminal trial testimony with prior convictions obtained when he was not represented by counsel?[1]

2. The court below ruled that "discriminating use of the 'harmless error' doctrine may lessen the retroactive impact of Burgett." Is such an open invitation to avoid any of the Court's recent retroactive decisions, such an abortion of the "harmless error" rule that it should not go uncorrected?

---

[1]As a ground for the issuance of the writ, petitioner only raises the general question: whether the use of constitutionally void prior convictions can ever be harmless error; but if the writ issues, he reserves the right to argue alternatively in his brief on the merits that the use of these particular prior convictions against him was not proven by the Commonwealth to be harmless error in this case, considering the quantum of evidence adduced.

CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

The case involves only the Sixth and Fourteenth Amendments to the United States Constitution, which are set out verbatim in Appendix B hereto, infra, ps. 64 - 65 , in accordance with Rule 23 (1) (d).

STATEMENT OF THE CASE

Petitioner was tried by a jury and convicted of armed robbery in the Massachusetts Superior Court in March 1964 and sentenced to serve 15-25 years in state prison. He testified in his own behalf, and on cross-examination the Commonwealth introduced five prior criminal convictions of his, the court instructing the jury that they were to be considered only as to petitioner's credibility. Three of the five ..

convictions were obtained when petitioner was not represented by counsel and had not waived his right to counsel.

Petitioner argued that it was error to use prior convictions obtained when he was without counsel at the trial and on his appeal. Commonwealth v. Bowlen,[2] 351 Mass. 655 (1967), cert. denied, sub nom. Gilday v. Massachusetts, 389 U.S. 916, rehearing denied, 389 U.S. 1010 (1967).[3] To clarify the record, petitioner then petitioned for a writ of error in the Massachusetts Supreme Judicial Court. There was a full evidentiary hearing, and although there was a specific finding that petitioner was not represented by counsel,

---

[2]Bowlen was the co-defendant.

[3]Decided before Burgett v. Texas, 389 U.S. 109 (1967).

did not waive his right to counsel, and was not informed that he had a right to counsel on the three convictions objected to, the court ruled that their introduction was "harmless error," citing Chapman v. California, 386 U.S. 18 (1967). Gilday v. Commonwealth, ___ Mass: ___, 247 N.E. 2d 396 (1969).

A petition for habeas corpus was then brought in the United States District Court for the District of Massachusetts, which also found that the admission into evidence of the constitutionally void convictions was "harmless error," citing Chapman v. California, supra, and the First Circuit affirmed on the same ground.

The five prior convictions introduced were as follows, the first three being the void ones in issue:

1. A September 12, 1951, Ohio conviction for breaking and entering in the nighttime and the larceny of certain guns; sentence: one year's probation.

2. An August 5, 1953, Minnesota conviction for carrying concealed weapons; sentence: thirty days.

3. A March 20, 1954, Massachusetts conviction for assault and battery; sentence: three months, suspended, and one year's probation.

4. A February 14, 1955, Massachusetts conviction for the attempted theft of a handbag; sentence: four to five years in state's prison.

5. Another February 14, 1955, Massachusetts conviction for armed robbery of $40; sentence: ten to twenty years in state's prison.

While the convictions were, under

Massachusetts law, introduced only to impeach petitioner's credibility, the district court found that the question before the jury was "whether the entire case of the prosecution was fabricated or whether the entire defense was fabricated. The opposing witnesses testified positively and in detail to two entirely different episodes."

REASONS FOR GRANTING THE WRIT

The Court is here presented with an attractive opportunity to clarify its opinion in Burgett v. Texas, 389 U.S. 109 (1967), and resolve a burgeoning conflict in the lower courts.

> "The meaning and application of Burgett has troubled appellate courts, both federal and state, throughout the country and more often than not has divided the members of those courts. There has been little agreement with respect to the application and effect of its rationale ....." Johnson v. State, ___ Md. ___, 263 A.2d 232, 236-237, (1970).

Specifically, when the First Circuit here held "that violations of the Burgett rule may properly be subjected to the 'harmless error' analysis of Chapman v. California," it aligned itself with the Third Circuit, see United States ex rel. Bolish v. Maroney, 409 F. 2d 1404 (3d Cir. 1969), and the Fifth Circuit. Beto v. Stacks, 408 F. 2d 313 (5th Cir., 1969), but see Bowie, v. Beto, 416 F. 2d 968 (5th Cir. 1969). By clear implication, if not specific holding, three other circuits, however, have determined that Burgett errors are not subject to "harmless error" analysis. See Tucker v. Craven, 421 F. 2d 139 (9th Cir.), cert. denied, sub nom. Craven v. Tucker, 38 U.S.L.W. 3465 (May 26, 1970) No. 1500; Oswald v. Crouse, 420 F. 2d 373 (10th Cir. 1970); United States v. Martinez, 413 F. 2d 61 (7th Cir. 1969). And other federal judges have differed on the

question,[4] as have the state courts.[5]

Federal and state courts, in attempting to resolve this issue, read the Court's holding in Burgett, supra at 115-116, as being as least ambiguous. Those which determine that Chapman

---

[4] Shorter v. United States, 412 F. 2d 428 (9th Cir. 1969) (dissenting opinion; issue not reached by majority); Contra, Tucker v. United States, 299 F. Supp. 1376 (N.D. Calif. 1969).

[5] Some have ruled the "harmless error" rule applicable, In re Dabney, 71 A.C. 1, 76 Cal. Rptr. 636, 452 P. 2d 924 (1969); People v. Coffey, 67 Cal. 2d 204, 60 Cal. Rptr. 457, 430 P. 2d 15 (1967); Johnson v. State, ___ Md. ___, 263 A. 2d 232 (1970); Gilday v. Commonwealth, ___ Mass. ___, 247 N.E. 2d 396 (1969); Gerberding v. State, 448 S.W. 2d 904 (Mo. 1970); accord, State v. G.I., 108 N.J. Super 186, 260 A. 2d 513 (1969), while others have ruled to the contrary. State v. Cameron, ___ Iowa ___, 167 N.W. 2d 689 (1969) (dissent); see, Green v. State, ___ Me. ___, 237 A. 2d 409 (1968); Graham v. State, 462 P. 2d 309 (Okla. Crim. 1969); Ex Parte Allen, 452 S.W. 2d (Tex. Crim. App. 1970); Ex Parte Bryan, 442 S.W. 2d 371 (Tex. Crim. App. 1969).

is not applicable often find support from dicta of the Court in Sibron v. New York, 392 U.S. 40, 56 (1968) and Hamilton v. Alabama, 368 U.S. 52, 55 (1961). See also, White v. Maryland, 373 U.S. 59, 60 (1963). Some which apply the Chapman rule find analagous support in Harrington v. California, 395 U.S. 250 (1969), in which the Court applied the rule to a case of Bruton error (Bruton v. United States, 391 U.S. 123 [1968]).

Further guidance is clearly necessary. This is particularly true because the other circuits are in unanimous agreement with the First Circuit's holding here, "that Burgett applies retroactively."[6]

---

[6] Tucker v. Craven, 421 F.2d 139 (9th Cir.), cert. denied, sub nom. Craven v. Tucker, 38 U.S.L.W. 3465 (May 26, 1970) No. 1500; Oswald v. Crouse, 420 F.2d 373 (10th Cir. 1969); Losieau v. Sigler, 406 F. 2d 795 (8th Cir. 1969); Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968).

This important question will be presented in other courts with recurring frequency.

An equally important reason for granting the writ is the lower court's ruling that "discriminating use, of the 'harmless error' doctrine may lessen the retroactive impact of Durgett." Such "discriminating use" could just as easily be the instrument to avoid the dictates of any of the Court's recent retroactive decisions. Utilizing those decisions on a case by case basis to secure individual justice is already difficult enough without having this open invitation to avoidance be let go uncorrected.

While restricted to state court machinations, Mr. Justice Harlan, dissenting in Chapman, supra, at 50, foresaw that "harmless-error decisions may result in the dilution of new constitutional doctrines because of . . . hostility to them." The

First Circuit here boldly espouses just such "dilution."!

Both the Chapman and Harrington decisions make patent that the Court envisages the use of the constitutional "harmless error" rule only to obviate new trials because of matters which are de minimus. Unless clear misapplications of the rule, such as here presented, are struck down early, they will spawn a generation of unconstitutional progeny.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Francis J. DiMento
DiMento & Sullivan
100 State Street
Boston, Massachusetts 02109

Of Counsel:
Daniel F. Featherston, Jr.
7 Water Street
Boston, Massachusetts 02109

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM M. GILDAY, JR., Petitioner,	)	
	)	MISC. CIVIL
v.	)	
	)	NO. 69-35-G
PALMER C. SCAFATI, Superintendent of Massachusetts Correctional Institution at Walpole, Respondent.	)	

OPINION

January 9, 1970

GARRITY, J. Petitioner for habeas corpus, Gilday, was convicted in state court in 1964 for armed robbery in Haverhill, Massachusetts, on August 18, 1963 and sentenced to a term of from 15 to 25 years. He is serving this sentence at the Massachusetts Correctional Institution at Walpole.

His conviction and that of a codefendant, Bowlen, were affirmed on appeal. Commonwealth v. Bowlen et al., 1967, 351 Mass. 655. Thereafter petitioner filed a writ of error based upon one of the grounds he had urged unsuccessfully on appeal, viz., admission in evidence to impeach his credibility of prior convictions at which he was not represented by counsel. After hearing by a single justice of the Supreme Judicial Court, the single justice found the facts and reserved and reported the case to the Full Bench without decision. The conviction was reaffirmed on the ground that any error in admitting the prior conviction in evidence was harmless beyond a reasonable doubt. Gilday v. Commonwealth, 1969 Mass. Adv. Sh. 718.

The petition for habeas corpus alleges three categories of errors: (a) admission into evidence

of the records of prior convictions which were the subject of the writ of error; (b) denial of the petitioner's motion to suppress as evidence approximately $1700 in currency which was admitted in evidence against him at the trial; and (c) admission of identification evidence which was allegedly tainted with the alleged illegal seizure of the $1700 currency and which in petitioner's view, flowed from an unconstitutional identification procedure.

Of the three types of errors asserted by Gilday only the first, i.e., pertaining to the prior convictions, has been presented fully to the state courts. Alleged errors relating to identification evidence were not included in petitioner's assignments of error on appeal, see Mass. G.L. c. 278, §33D, nor mentioned in the appellate court's opinion. Regarding the

motion to suppress, neither the petitioner's assignments of error nor lengthy brief on appeal asserted the invalidity of his arrest.[1] As stated in the opinion of the Supreme Court, at 657, "The validity of Gilday's arrest is not challenged." Therefore this court will not consider petitioner's identification argument and that portion of his argument relating to the motion to suppress which challenges the validity of his arrest. Needel v. Scafati, 1 Cir., 1969, 412 F. 2d 761.[2]

One other aspect of the petition requires

---

[1]This was the only assignment of error argued on appeal by codefendant Bowlen, whose arrest was weeks later and entirely separate from Gilday's.

[2]In his brief, petitioner's counsel contends that the Needel case was incorrectly decided. It is not within the province of this court to pass upon that contention.

comment before proceeding to the merits of contentions as to which Gilday has exhausted available state court remedies. 28 U.S.C. §2254. Petitioner has moved for summary judgment on the issue of the admission into evidence for impeachment purposes of records of prior convictions at which he was not represented by counsel. In connection therewith he filed a motion that the court not consider the transcript of the proceedings in the state court in deciding the motion for summary judgment; and also filed a so-called formal objection to the same effect. Petitioner's contention is that the trial transcript was not marked as an exhibit in evidence before the single justice who heard the petition for writ of error and was never properly a part of the record before the Supreme Judicial Court on the single justice's findings, reservation and report.

Petitioner also points out that the appellate court did not issue an order enlarging the record before it to include the original trial transcript. This court denies both motions and overrules the so-called formal objection. It is completely clear from the rescript opinion deciding the petition for writ of error that the Supreme Judicial Court based its conclusion, that any errors at the trial regarding impeachment by prior convictions were harmless beyond a reasonable doubt, upon a consideration of the trial transcript. The opinion alludes to the "strong evidence of guilt" of the petitioner and makes reference to other evidence not presented to the single justice. In reviewing the judgment of the Supreme Judicial Court, that the use at the trial of the records of the convictions in question was harmless under the test of Chapman v. California, 1967, 386 U.S.

18, 24, this court has read the entire transcript of the trial and other proceedings in the state court.

Findings of Fact:

1. The robbery for which Gilday and Bowlen were convicted occurred on a Saturday afternoon, August 17, 1963, in Haverhill, Massachusetts. The principal victim, one Theofilopoulos, operated a neighborhood variety store and had previously been convicted of being present in a room unlawfully used for gaming, memoranda of bets having been found in said room.[3] According to the victim and several other witnesses, the two defendants entered the store about 6:30 P. M. and, with drawn guns, robbed the proprieter of

---

[3]Whether the room involved in the prior conviction was on the same premises as the variety store did not appear.

the contents of his wallet and the cash register and two customers of lessor amounts.[4]

2. On the following afternoon, Sunday, August 18, Gilday was involved in an automobile accident in Middleton.[5] When the Middleton police arrived on the scene he was unable to produce his driver's license or registration certificate. There was some delay due to his searching through

---

[4] The amount of money taken from Theofilopoulos was the subject of considerable testimony at the hearing on the motion to suppress and at the trial, whether it was $500 as originally stated in the complaint, between $1300 and $1400 as estimated by the victim at the hearing on the motion, or a greater sum, or one somewhere in between.

[5] This recitation of the circumstances of Gilday's arrest and the seizure of the cash in his pockets is taken largely, though not entirely, from the opinion of the Supreme Judicial Court supra, at 656-657--it is amply supported by the record.

various articles in his car for the papers. The police, by radio, inquired about the license and registration from the Registry of Motor Vehicles. It being Sunday, there was considerable delay in obtaining this information. At 5:20 P.M., about two hours after the police arrived, Gilday was arrested and charged with several motor vehicle violations. His physical condition was "dazed" and his eyes were "glassy" and his knee had been injured. At his request he was taken to a hospital for treatment and from there to the Danvers Police Station, which is used as a lockup by the Middleton police. He arrived at the police station about 6:30 P.M., where he was booked and subjected to a search, which revealed that he had approximately $1700 in currency in his pockets. The cash and some other items of personal property were retained by the Middleton police.

3. The Middleton police notified the Haverhill police of the discovery of the large sum of money in the petitioner's possession. A Haverhill police inspector contacted the main victim, Theofilopoulos, and drove him to the Danvers station. He did not tell Theofilopoulos about any money having been found in petitioner's pockets. The night before Theofilopoulos had told the Haverhill police that he had written the figures "76" with a red ballpoint pen on one of the bills taken from him by the robbers. Upon arriving at the station the victim observed the petitioner, who was alone in a room at the time, and identified him as one of the robbers. Thereafter the victim and the officer examined the money which had been taken from the petitioner's pockets. They found among it the bill with the distinctive marking; and the victim also found approximately the same number

of large bills as had been taken from him the previous afternoon. The Haverhill inspector thereupon instructed the Middleton police to keep the money under their control in connection with the robbery. The inspector returned to Haverhill and at about midnight obtained a warrant for the petitioner's arrest for the robbery from the district court at Haverhill. He notified the Middleton police of the issuance of the warrant and told them again to hold all the money. It was this money to which the motion to suppress was directed and which was later admitted in evidence.

4. At the trial, the main witnesses for the prosecution were Theofilopoulos and two customers, Samoisette and White, who identified both defendants as the two armed robbers. Other prosecution evidence included testimony by Mrs.

Vialon that she saw Gilday get from an automobile near the store and sit in it for three or four minutes before being joined by Burgos and that the petitioner was wearing dark glasses and a round style sunglasses. This corroborated a description of the petitioner given by witnesses who were in the store at the time of the robbery. A pharmacist, Aragon, testified that during the early afternoon of August 18, the petitioner visited his store and in the process counted the currency in [illegible] a total of [illegible] before leaving the store [illegible] the sunglasses on display [illegible] some of them on but did not buy [illegible] after the petitioner had left the [illegible] found near the sunglasses [illegible] round sunglasses which matched [illegible]

description given by witnesses to the robbery. Later that some afternoon, when Gilday drove his automobile off the highway, a motorist, witness Allen, coming to his aid asked him if he was hurt and he replied that he was not. The witness then asked, "Well, you want me to call the police, or a wrecker?" Gilday replied, "Well, you might just as well, because I'm done for now."

5. When the Commonwealth rested, the district attorney stated that some of the prosecution witnesses who had been sworn at the outset of the trial would not be called upon by the Commonwealth to testify because their testimony would be corroborative. Counsel for Gilday requested that the court order them to remain in court and this was done. The witnesses not used by the prosecution were then identified

as Messrs. Collias, Fanaras, Long[6] and Cadorette. Gilday then proceeded with his defense.

6. The testimony of the first four witnesses called by Gilday was directed toward impeaching proseuction witnesses White and Theofilopoulos. The petitioner then called as his own witness Fanaras, one of the witnesses who had been summoned by the prosecution but who had not been called to testify. At the probable cause hearing regarding the robbery, on August 26, 1963, in the Central District Court of Northern Essex at Haverhill, Fanaras had testified that $200 had been taken from him by the robbers; that he could recognize only one of the robbers, Gilday, and could identify him only by his voice; that when the robbers entered the store he was

---

[6] Long was the only one not called upon to testify.

standing near a tonic machine. During direct examination of this witness, petitioner's counsel frequently referred to the fixture as a "Coke" machine.

7. The next defense witness, Peterson, was a court stenographer engaged by defense counsel to record the August 26, 1963 hearing on probable cause. His testimony related chiefly to impeaching Theofilopoulos' recollection of the amount of money he had on him and in the cash register at the time of the robbery.

8. Gilday then took the stand. He testified as follows: he was a licensed electrician and first visited Theofilopoulos' variety store in Haverhill on August 17, 1963 at about 10:30 in the morning. The purpose of the visit was to collect $850 he had won from Theofilopoulos at a card game on the previous weekend and also to

install five illegal telephones at various locations in the building at a price of $200 per installation. Theofilopoulos told him that Samoisette had not gotten the telephones from Western Electric and that he, Gilday, should come back later in the day. Theofilopoulos told him that he was unable to pay Gilday the gambling debt because his partner, Pappas, was not present but that Pappas would be there later in the day and the debt would be paid when the petitioner returned to install the illegal telephones in the afternoon. There was a room to the rear of the public portion of the variety store in which the proprietor conducted a gambling operation. During a period of about three weeks before August 17, 1963, Theofilopoulos had discussed the installation of the illegal telephones with the petitioner on a number of occasions. The number of phones to be installed

would depend on how many Samoisette could get at Western Electric Company. From the previous night at about 10:30 P. M. until the end of the day on August 17, petitioner was accompanied by Bowlen. The petitioner and Bowlen came up from Boston together early Saturday morning and both stayed the night at petitioner's brother's home in Andover. Bowlen knew that he, Gilday, planned to visit Theofilopoulos on Saturday to collect the gambling debt and to install telephones. Bowlen accompanied him to the variety store on Saturday morning but stayed outside the store while the petitioner entered and conversed with the proprietor.

9. Gilday also testified: he and Bowlen returned to the scene at about 5:00 o'clock that afternoon. Neither he nor Bowlen was carrying a gun. When they entered, Theofilopoulos was in

the back room getting the results of the seventh race on a coin telephone. Samoisette was there and had a bag with at least two telephones in it. Theofilopoulos refused to pay him the gambling debt and a fight ensued. Petitioner was struck from behind on the head with a Coke bottle which he saw on the floor after it had fallen out of the hands of the man who had struck him. Everyone in the store started fighting and Bowlen "decked about four of them, boom, like that." Thereupon Gilday and Bowlen fled while the proprietor screamed after them, "I'll get you, I'll get you, you'll never get your money."

10. Concerning his arrest and incarceration on the following day, petitioner testified: he was alone in a small room at the Danvers Police Station on the evening of August 18 when Theofilopoulos was brought to the station and

observed him. When asked if the petitioner was one of the robbers, the victim stated that he was not sure. The police officer accompanying the victim told him to take a good look and the victim then said, "Yes, that's the man." The petitioner then protested his innocence. The sum of approximately $1700 removed from his person on August 18 consisted principally of money earned redoing a Boston nightclub at which he had met Bowlen and part of it was gambling winnings from playing cards at Theofilopoulos' place.

11. Toward the end of petitioner's testimony on crossexamination, the prosecuting attorney elicited admissions from him that he was the same Gilday who was convicted of five previous offenses, as follows: (a) on February 14, 1955, attempted theft of a handbag, resulting in a sentence of 4 to 5 years at Massachusetts

Correctional Institution at Walpole, (b) on February 14, 1955, while armed with a rifle, robbery from the person of a different individual of $40, resulting in a 10 to 20 year sentence at the same institution, (c) on March 20, 1954, assault and battery, in the Second District Court of Essex at Amesbury, Massachusetts, with a sentence of 3 months, suspended, and probation for one year, (d) on August 5, 1953, in Municipal Court for the City of Duluth, Minnesota, carrying concealed weapons, resulting in a sentence of 30 days at the County Jail and weapon ordered confiscated, and (e) on September 12, 1951, in Court of Common Pleas, Greene County, Ohio, breaking and entering into a sporting goods store in the nighttime and stealing certain pistols, shotguns, revolvers and miscellaneous sporting goods of value of

$2060, at Fairborn, Ohio, resulting in a sentence of probation for one year.[7] The defendant did not object to the introduction of convictions (a), (b) and (c). He objected and excepted to the admission of (d) and (e). In prior proceedings (c), (d) and (e) he was not represented by counsel. The Ohio court record regarding (e) was erroneous in that the judgment recited that the defendant appeared for sentencing "with his counsel."[8]

---

[7] This description of the petitioner's prior offenses is more detailed in some respects than the prosecuting attorney's questions on cross-examination because the certified copies of the court records themselves, except for the assault and battery conviction in the District Court at Amesbury, were eventually submitted to the jury as exhibits in the case.

[8] As found by the single justice, the person accompanying the defendant was not an attorney, but rather an Army officer who appeared with the petitioner as a friend. The Army officer had not been designated by the military to represent the petitioner, who was then a private in military

On redirect examination petitioner's counsel sought to revive the subject of the prior convictions and objected and excepted to the court's ruling that he could not refer to them. See Lamoureux v. NY, NH & H Ry. Co., 1897, 169 Mass. 338, 340.

12. Petitioner then called another witness, Cadorette, who had been sworn as a prosecution witness but who had not testified for the prosecution. Cadorette testified that he had gone into the variety store at about 6:00 o'clock and was reading a newspaper when two robbers entered at around 6:20. He identified only one of them, Bowlen, whom he said was carrying and pointing

---

service. In referring to this case and to the probationary sentence that was imposed in the Ohio court, the Supreme Judicial Court in passing on the writ of error stated, "The disposition indicates effective representation."

a gun. Cadorette was unable to identify the other robber, whom he did not watch.

13. The final witness for the petitioner, Collias, had also been sworn originally as a witness for the prosecution. He testified that he entered the variety store at 6:50 P. M. while the robbery was in progress and that one of the robbers, whom he identified as Bowlen, put a gun in his back. He did not identify the second robber. He said that the two robbers left the store at about 7:00 o'clock.

14. Bowlen took the stand in his own defense and called no other witnesses. He testified as follows: he was a partner in a vending machine operation in Boston and installed vending machines and collected money from them. He left Boston with Gilday during the early morning hours of August 17, 1963 and stayed overnight with him at

Gilday's brother's house in Andover. He then accompanied petitioner on the morning of August 17 to the variety store, where the petitioner went for the purpose of seeing Theofilopoulos about some money due him. He, Bowlen, had met the victim a couple of times previously in the spring of the previous year. Gilday entered the variety store alone in the morning and after Gilday's visit they returned to the brother's house in Andover. They went back to the variety store in Haverhill at about 5:00 o'clock. Petitioner was driving the automobile which they parked at the top of a hill before going to and entering the variety store. He knew that the purpose of petitioner's visit to the variety store was to collect some money from Theofilopoulos and also that petitioner had some business with him about some phones or something. Neither

he nor petitioner was carrying a weapon, nor did they have or use a weapon at any other time that day. When they entered the store he went to one side of the room and stood with his back to the wall and petitioner went up to Theofilopoulos and talked with him for three minutes or so. All of a sudden Gilday started screaming at the proprietor, "I want my money or I'll kill you." The proprietor replied, "You're not getting nothing, you punk," and petitioner slapped him across the face and started choking him. Thereupon Fanaras, who had been standing about five feet away, came over behind Gilday and hit him over the head with a bottle. Bowlen then charged right over and hit Fanaras with a right hand and a melee ensued. Petitioner had fallen to one knee but was able to get up and join the fray. He and Gilday flattened all their opponents, who

were sprawled out all over the place, but he didn't even get hit. On crossexamination Bowlen admitted to three previous convictions for robbery, one while armed with a bottle and another while armed with a sharp instrument. On the former he was sentenced to from 6 to 12 years imprisonment and on the latter to a term of 5 years and 1 day.

15. In rebuttal the prosecution offered the testimony of three witnesses pertaining to the case against the petitioner: Samoisette testified that he did not start working for Western Electric Company until September 1963. Fanaras testified that he did not hit the petitioner with a bottle. Theofilopoulos testified that he had not played cards or gambled with the petitioner on the Sunday preceding the robbery and had not asked the petitioner to install any telephones.

16. The case was submitted to the jury on March 3, 1964, one week after the trial had begun. In his instructions to the jury, the trial judge made it clear that the only purpose for admitting the records of prior convictions of the two defendants and the victim, Theofilopoulos, was to aid the jury in appraising their credibility. After the jurors had deliberated from 2:40 P.M. to 5:15 P.M. they were brought back to the courtroom and the court read to them the oft-quoted language from Commonwealth v. Tuey, 1851, 62 Mass. 1, urging that they decide the case if they could conscientiously do so. One-half hour later the jury returned a sealed verdict, which was opened the following morning. Both defendants were found guilty and sentenced to prison terms of not less than 15 nor more than 25 years.

Conclusions of Law

Assuming the legality and validity of the petitioner's arrest and incarceration on August 18, 1963, the day following the robbery, the trial court did not err in denying the petitioner's motion to suppress. The $1700 currency was properly taken from the petitioner at the police station as part of a routine security measure. See Cotton v. United States, 9 Cir., 1967, 371 F.2d 385, 392. True, the money was unconnected with any of the traffic violations for which the petitioner had been arrested and could not have been seized incident to his arrest. See Jack v. United States, 9 Cir. 1967, 387 F.2d 471, 473-474. However, once taken from the petitioner in connection with a custodial search, it did not thereby become immune from police

interest. This much is conceded by the petitioner in the last page of his brief, where it is stated,

> "The money was supposedly taken originally and held for Gilday's benefit. The police had no right to use it for their own purposes. This is not to say that they were required to pretend that they had not seen it. They had every right to investigate further. But they had no right to show it to anyone else, or give it to anyone else for examination. Hatschner v. United States, supra." (10 Cir. 1962., 305 F. 2d 371.)

The Middleton police did not exhibit the money to Theofilopoulos until after he had identified the petitioner as one of the participants. Nor did the Haverhill police tell him about any money having been found in petitioner's pockets until after the identification. On the previous evening he had told the Haverhill police officer who accompanied him to the Danvers Police Station on the following night about the approximate proceeds of the robbery and that

one of the bills taken in the robbery bore a distinctive "76" marking. In the court's opinion, it was reasonable in view of the identification for the police to exhibit the currency taken from the petitioner to the identifying witness, who had been the victim of the robbery on the day before. After the identification, there was strong cause to believe that the money was the proceeds of the crime.

Petitioner contends that the Haverhill police should have applied for a search warrant before displaying the currency to the victim. But the money was no longer on the person or under the control of the petitioner and there was no person or place to be searched. The Haverhill police did apply immediately to the district court at Haverhill for a warrant for petitioner's arrest for the robbery and notified

the police at the Danvers station of its issuance. The court concludes that under the circumstances seizure of the currency was reasonable.

Regarding impeachment of the petitioner as a witness by use of three prior convictions, in connection with which the petitioner was not represented by counsel, it was error to admit them in evidence under the Sixth and Fourteenth Amendments to the Constitution of the United States. Burgett v. Texas, 1967, 389 U.S. 109. Although the trial in the petitioner's case occurred approximately three years before the Burgett decision, it is to be applied retroactively. See Bates v. Nelson, 1968, 393 U.S. 16, and Subilosky v. Commonwealth of Massachusetts, 1 Cir. 1969, 412 F.2d 691, fn. 2 at 693. On the question whether or not the error was harmless, in reaching the conclusion that it was, the Supreme

Judicial Court applied the proper standard, i.e., whether it was harmless beyond a reasonable doubt.

Upon consideration of all the testimony and proceedings at the trial this court also concludes that the error in admitting the three prior convictions at which Gilday was unrepresented by counsel for purposes of impeaching his credibility at the trial was harmless beyond a reasonable doubt. See Harrington v. California, 1969, 395 U.S. 250. We shall first consider the evidence affecting petitioner's credibility previous to his being confronted with records of the voidable convictions. By the time petitioner concluded his direct testimony his credibility was at a low ebb. According to his own testimony he visited the variety store in question twice on the day of the alleged robbery for the illegal purpose of

installing bootleg telephones to assist Theofilopoulos in an illegal gambling operation. He also went there for the purpose of collecting a gambling debt which was legally unenforceable. He went there in the company of a strong-arm companion who knew the illegal purpose of his visit and whose actions upon their entering the store that afternoon, especially his going to one side of the room with his back to the wall, indicated that Bowlen was present in order to pressure Theofilopoulos into making payment. Also, petitioner had admitted that he was the Gilday who had been convicted of robbery while armed with a rifle, for which he had been sentenced to prison for a term of from 10 to 20 years.

The nature of the three improperly admitted prior convictions is, of course, also important.

Two of them had been disposed of by probationary sentences. The other had resulted in a jail sentence of only thirty days. The jury undoubtedly considered them to be minor violations. There is no reasonable possibility that they might have contributed to the conviction. Tucker v. United States, N.D. Cal. 1969, 299 F.Supp. 1376, 1378.

Gilday has argued that the Ohio and Minnesota convictions must have been harmful because they involved guns and the key question at the trial was whether or not the defendants entered the variety store while armed. The court believes that this argument misconceives the basic issue presented to the jury. The crucial factual dispute was not whether the robbers were armed when they visited the variety store on that Saturday afternoon. Rather it was whether the entire case of the prosecution was fabricated or whether the

entire defense was fabricated. The opposing witnesses testified positively and in detail to two entirely different episodes. As the testimony unfolded the key question became whether the defendants entered the store at 5:00 o'clock or at 6:30 P. M. On this question petitioner's trial strategy backfired. After he had testified he called as his own witnesses two persons who had been sworn as prosecution witnesses at the outset of the trial but who had not been called to the stand. They did not identify petitioner as one of the participants, but they were certain that an armed robbery had occurred between 6:30 and 7:00 P. M. and were able to identify Bowlen.

Petitioner has suggested that the trial judge's giving the jury the so-called "dynamite" instructions from Commonwealth v. Tuey, supra, indicates that the jury was having difficulty

reaching a verdict and presumably deciding the issue of the petitioner's credibility. But the Tuey instructions were given only two hours and thirty-five minutes after the jury had commenced its deliberations and a verdict was returned thirty-five minutes later. Cf. Miller v. California, 1967, 392 U.S. 616, 629, in which the jury deliberated for three days before reaching a verdict. Considering the length of the trial and the fact that there were two defendants and the complexity of the issues, the jury could not reasonably be expected to have deliberated for a shorter period of time.

Gilday has further contended that the error could not be harmless when the constitutionality of the practice of using prior criminal convictions to impeach a defendant is itself vulnerable. But Spencer v. Texas, 1967, 385 U.S. 554, 561, held

that the practice complained of by petitioner is constitutionally permissible and that "the conceded possibility of prejudice is believed to be outweighed by the validity of the State's purpose in permitting introduction of the evidence." Moreover, there is no intimation in Chapman v. California, supra, at 23, that the instant case concerns one of those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"; the reference to right to counsel, at 23 n. 8, plainly means counsel at the trial whose judgment is under attack. This is not to say that the "potentiality for prejudice", Spencer v. Texas, supra at 560, of prior conviction evidence is immaterial to the issue of the harmlessness of the error at the trial. On the contrary, that potentiality is highly relevant and material and

has been recognized and considered by this court in determining whether the error at trial was harmless under the test of Chapman v. California, supra.

Although overwhelming evidence of guilt is of subsidiary significance, it need not be ignored in determining questions of harmlessness of error. Harrington v. California, supra, at 253-254.

Without describing in detail the testimony of all the witnesses who said they were in the variety store when the robbery occurred, a careful reading of the record demonstrates their reliability. The gaps in their recollections, the inconsistencies in their testimony in minor respects, their inability in some instances to identify the petitioner as a participant and their graphic descriptions of the defendants' use of their weapons and their taking money from two

of the bystanders as well as from Theofilopoulos--all support their resolution to testify honestly.

On the other hand, various aspects of the testimony indicate that the defendants' testimony was a fabrication tailored to take advantage of presumably undisputed facts. For example, witness Samoisette at the time of trial was employed by Western Electric Company, which manufactures telephones. Accordingly, petitioner testified about Theofilopoulos obtaining telephones from Samoisette for illegal installation by petitioner. On rebuttal, however, it developed that Samoisette was not employed at Western Electric Company until a month after the robbery. Witness Fanaras had been sworn as a prosecution witness at the commencement of the trial but had not been called by the prosecution. Previous to Gilday's testimony, the defense had

called Fanaras as its own witness and brought out from him that he had been standing near a tonic machine when the defendants entered the store. This laid a foundation of sorts for the testimony by both defendants that Fanaras had come up from behind petitioner and struck him on the head with a Coke bottle. Along the same lines, Theofilopoulos' prior conviction for being present where gambling apparatus was found served as a prop for Gilday's testimony that he was receiving race results on a coin telephone when the defendants entered the store in the afternoon.

In addition to direct evidence there was overwhelming circumstantial evidence of Gilday's guilt. In particular, his having on his person at the time of his arrest on the following afternoon approximately the same

amount of cash as had been stolen, especially the bill bearing the distinctive "76" marking, was completely incriminating.

On the special facts of this case, the court believes (a) that the respondent has shown beyond a reasonable doubt that the jury did not rely on petitioner's prior convictions so support the guilty verdict at the trial in the state court, and (b) that the federal Constitutional error at the trial, viz., admitting in evidence for purposes of impeachment records of prior convictions of the petitioner at which he was not represented by counsel, was harmless beyond a reasonable doubt.

The petition for a writ of habeas corpus is denied and the case is dismissed.

W. Arthur Garrity, Jr.
United States District Judge

United States Court of Appeals
For the First Circuit

No. 7527.

WILLIAM M. GILDAY, JR.,
PETITIONER, APPELLANT,

v.

PALMER C. SCAFATI,
RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Daniel F. Featherston, Jr., with whom *Daniel Klubock* was on brief, for appellant.

Jeremiah O'Sullivan, Deputy Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, and *Lawrence P. Cohen*, Assistant Attorney General, were on brief for appellee.

June 24, 1970.

COFFIN, *Circuit Judge*. Petitioner was tried and convicted of armed robbery in the Superior Court of Massachusetts in March 1964 and is presently serving his sentence of 15-25 years. During that trial, after petitioner had testified on his own behalf, the prosecutor offered evidence of five prior convictions to impeach petitioner's credibility, three of which were the product of trials where petitioner neither had nor waived the assistance of legal counsel. Petitioner's appeal from the district court's denial of a writ of habeas corpus presents three issues concerning the use of these three "uncounseled" convictions: whether the rule of *Bur-*

gett v. *Texas*, 389 U.S. 109, 115 (1967)—that prior "uncounseled" convictions are inadmissible "to prove guilt or enhance punishment"—prevents the use of such convictions to impeach a criminal defendant's credibility; if so, whether such rule applies to criminal trials conducted prior to the Court's decision in *Burgett*; and, if so, whether the defendant's conviction can still be sustained because the improper admission of three such convictions in the case before us constitutes "harmless error beyond a reasonable doubt" within the meaning of *Chapman* v. *California*, 386 U.S. 18, 24 (1967). We, like the district court, answer all three questions in the affirmative.

I.

The *Burgett* rule is founded on the Court's decision in *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963), that the absence of counsel or waiver in a criminal trial necessarily invalidates the conviction, *Chapman* v. *California*, 386 U.S. at 23, because lack of counsel so jeopardizes the fairness of the trial that any ensuing conviction is likely to be unreliable.[1] *Desist* v. *United States*, 394 U.S. 244, 250 (1969). In addition to the unreliability of uncounseled convictions, their use in a subsequent criminal proceeding simply compounds the original denial of the constitutional right to the assistance of counsel. For these reasons, such convictions may not be used "to prove guilt or enhance punishment". *Burgett* v. *Texas*, 389 U.S. at 115.

We conclude that the *Burgett* rule against use of un-

[1] Gilday sought to object to the introduction of two of the three counsel-less convictions, seemingly on that very ground, but was cut off. Hence we need not decide in this case whether, at least post-*Gideon*, a defendant represented by counsel should have anticipated *Burgett*, and could fairly be charged, if he failed to object, with waiver in cases where the prior counsel-less conviction is used only collaterally. It must be borne in mind, however, that a defendant must generally know if he was not represented by counsel, whereas the prosecution, in obtaining records of convictions from other courts, in all probability does not.

counseled convictions "to prove guilt" was intended to prohibit their use "to impeach credibility", for the obvious purpose and likely effect of impeaching the defendant's credibility is to imply, if not prove, guilt. Even if such prohibition was not originally contemplated, we fail to discern any distinction which would allow such invalid convictions to be used to impeach credibility. The absence of counsel impairs the reliability of such convictions just as much when used to impeach as when used as direct proof of guilt. Moreover, such use compounds the original denial of the constitutional right just as surely as does use "to prove guilt or enhance punishment". Finally, defendant's privilege to testify or not to testify—*Griffin* v. *California*, 380 U.S. 609, 614 (1965)—is seriously impaired if the price of testifying is the potential admission of invalid and possibly unreliable convictions which could not otherwise be admitted. We therefore hold that *Burgett* prevents the use of uncounseled convictions for purposes of impeachment.[2] *Accord: People* v. *Coffey*, 430 P.2d 15, 25, 60 Cal. Rptr. 457, 467 (Cal. 1967); *Johnson* v. *State of Maryland*, 38 U.S.L.W. 2537 (Md. Ct. Spec. App. March 17, 1970); *see Shorter* v. *United States*, 412 U.S. 428, 431-435 (9th Cir. 1969), *cert. denied*, 396 U.S. 970 (1969). Instructions limiting the use to which the jury may properly put uncounseled convictions are insufficient safeguards when such convictions are invalid and obtained in violation of a specific constitutional right. *Burgett* v. *Texas*, 389 U.S. at 115; *see Tucker* v. *Craven*, 421 F.2d 139 (9th Cir. 1970), *cert. denied*, 38 U.S.L.W. 3462 (May 26, 1970).

---

[2] In discussing the potential adverse effects of a criminal conviction, the Court in *Sibron* v. *New York*, 392 U.S. 40, 55-57 (1968), made mention of the fact that such convictions might be used to impeach the defendant's character in a subsequent criminal proceeding. Implicit in such discussion was the principle that a criminal conviction could only be used in that manner if the conviction itself was a valid one.

II.

Our discussion of the scope of the *Burgett* rule foreshadows our view of its retroactivity. *Gideon* v. *Wainwright*, *supra*, the progenitor of *Burgett*, has been made retroactive because of the likely unreliability of any uncounseled conviction. *Desist* v. *United States*, 394 U.S. at 250. *Chapman* v. *California*, 386 U.S. at 23, indicates that the denial of counsel in a criminal trial could never be "harmless error". The use of *unreliable* evidence obtained in violation of a specific constitutional right does go directly to the fairness of a subsequent trial and conviction—having "a significant effect on the 'integrity of the fact-finding process' ". *Berger* v. *California*, 393 U.S. 314, 315 (1969)—unlike other recent decisions preventing improper police behavior which yield admittedly reliable evidence. *See generally Desist* v. *United States*, *supra*.

In *Desist*, the Court set forth and discussed the three factors relevant to the question of retroactivity. Obviously the purpose of *Burgett* was to prevent the use of possibly unreliable convictions obtained at a trial whose fairness is constitutionally suspect. Secondly, while there had undoubtedly been reliance on a different rule, the importance of counsel at a criminal trial had been recognized in the 1930's and established unanimously in 1963—*see generally Gideon* v. *Wainwright*, *supra*—a relevant factor in assessing retroactivity. *E.g.*, *Berger* v. *California*, 393 U.S. at 315; *Roberts* v. *Russell*, 392 U.S. 293, 295 (1968). Thirdly, while we are not in a good position to assess the nationwide impact of retroactivity for *Burgett*, the Court has observed that even a significant impact must be accepted "when the issue of guilt or innocence may not have been reliably determined". *Roberts* v. *Russell*, 392 U.S. at 295. Moreover, discriminating use of the "harmless error" doctrine may lessen the retroactive impact of *Burgett* by sustaining those convictions in which guilt has been reliably deter-

mined. Finally, all other federal courts which have considered the issue have applied *Burgett* retroactively.[3] For the reasons stated above, we hold that *Burgett* applies retroactively.

III.

We move now to the question whether the improper admission of three invalid convictions can be considered "harmless error beyond a reasonable doubt" in the circumstances of this case. A preliminary question, however, concerns the propriety of any such discussion: some of the language in *Burgett*, at 115, might suggest that the "harmless error" doctrine is inapplicable in this context. *See also Sibron v. New York*, 392 U.S. at 56. However, there is no suggestion in *Burgett* of such overwhelming evidence of defendant's guilt independent of the prior uncounseled convictions that the Court's refusal to find "harmless error" there constitutes the adoption of a "per se" approach to violations of the *Burgett* rule. More importantly, a violation of *Burgett* simply does not necessarily pervade and distort the entire proceeding in the same manner that the partiality of the presiding judge or the denial of counsel at the trial in question does. *See Chapman v. California*, 386 U.S. at 23, n. 8; *see also Chiu Kee v. Commonwealth of Massachusetts*, 407 F.2d 10, 13-15 (1st Cir. 1969) (absence of counsel at Massachusetts arraignment was harmless error), *cert. denied*, 395 U.S. 982 (1969). Rather, the introduction of a prior uncounseled conviction is simply one piece of evidence from which guilt might be inferred: it is not itself conclusive evidence that the crime charged has been committed. *Compare Payne v. Arkansas*, 356 U.S.

---

[3] *Williams* v. *Coiner*, 392 F.2d 210 (4th Cir. 1968); *Losieau v. Sigler*, 406 F.2d 795 (8th Cir. 1969), *cert. denied*, 396 U.S. 988 (1969); *Smith v. Crouse*, 420 F.2d 373 (10th Cir. 1969); *Tucker v. Craven*, 421 F.2d 139 (9th Cir. 1970), *cert. denied*, —— U.S. —— (1970); *Clark v. Turner*, 283 F. Supp. 909 (D. Utah 1968); *see Bates v. Nelson*, 393 U.S. 16 (1968).

560 (1958) (coerced confession). We therefore conclude that violations of the *Burnett* rule may properly be subjected to the "harmless error" analysis of *Chapman v. California*, and its progeny. *Beto v. Stacks*, 408 F.2d 313, 318 (5th Cir. 1969); *Tucker v. United States*, 299 F. Supp. 1376 (N.D. Cal. 1969); *People v. Coffey*, 60 Cal. Reptr. at 467.

Petitioner was tried together with one Bowlen. Theofilopoulos testified that the two defendants entered his neighborhood variety store about 6:30 p.m. on August 17, 1963, with guns drawn, and robbed him, his cash register, and two customers. This testimony was completely corroborated by two eyewitnesses who identified both defendants as the robbers. Subsequent testimony revealed that petitioner had been arrested on the following day for several motor vehicle violations and been found with $1700 in his possession, and that Theofilopoulos had come to the station house and identified petitioner as one of the robbers. Theofilopoulos also told the police, prior to his arrival at the station, that one of the stolen bills had a "76" penciled on it; such a bill was among petitioner's $1700. Three other persons testified concerning petitioner's activities before and after the alleged robbery, providing circumstantial evidence tending to establish petitioner's involvement in a robbery. The prosecution rested.

Petitioner's witnesses sought to impeach the prosecution witnesses, by revealing a prior conviction of Theofilopoulos for being present in a room unlawfully used for gaming and some contradictory statements concerning the amount of money taken from him. Petitioner then took the stand to tell his version of the events of August 17. He and Bowlen entered the variety store around 5:00 p.m. to install five illegal telephones for an illegal gambling operation and to collect an illegal gambling debt. When Theofilopoulos refused to pay, a fight ensued, which petitioner

and Bowlen won rather handily before fleeing, without taking any money. Petitioner offered a plausible but unsubstantiated story to explain the $1700 in cash in his possession. Importantly, petitioner admitted being with Bowlen throughout the times in question on August 17.

On cross-examination, the prosecution offered evidence of five prior convictions against petitioner, the three earliest and least serious ones having been obtained when petitioner neither had nor had waived the assistance of counsel.[4] Two of these convictions were admitted over petitioner's objection, with the admonition then and later that they were to be considered only in considering petitioner's credibility.

Petitioner then called to the stand two prosecution witnesses who had not been called by the prosecution. Neither could definitely identify petitioner as one of the robbers, but each testified that he had witnessed an armed robbery at Theofilopolous' variety store at 6:30 p.m. on August 17, and each identified Bowlen as one of the two robbers. Bowlen then took the stand to offer a version similar to petitioner's account; cross-examination revealed three valid robbery convictions against Bowlen.

The case was submitted to the jury a week after the trial

---

[4] The convictions were as follows: (1) on February 14, 1955, attempted theft of a handbag, resulting in a sentence of 4 to 5 years at Massachusetts Correctional Institution at Walpole, (2) on February 14, 1955, while armed with a rifle, robbery from the person of a different individual of $40, resulting in a 10 to 20 year sentence at the same institution, (3) on March 20, 1954, assault and battery, in the Second District Court of Essex at Amesbury, Massachusetts, with a sentence of 3 months, suspended, and probation for one year, (4) on August 5, 1953, in Municipal Court for the City of Duluth, Minnesota, carrying concealed weapons, resulting in a sentence of 30 days at the County Jail and weapon ordered confiscated, and (5) on September 12, 1951, in Court of Common Pleas, Greene County, Ohio, breaking and entering into a sporting goods store in the nighttime and stealing certain pistols, shotguns, revolvers and miscellaneous sporting goods of value of $2060, at Fairborn, Ohio, resulting in a sentence of probation for one year. Petifioner had the assistance of counsel in (1) and (2).

began. After some six hours deliberation, a verdict of guilty was returned against both defendants.

Viewing all the evidence summarized above, and reported by the district court in more complete detail, we are satisfied that the error of admitting the three uncounseled convictions for purposes of impeachment was "harmless beyond a reasonable doubt". Three witnesses positively identified petitioner as one of the robbers; five so identified Bowlen, whom petitioner admitted having been with throughout the times in question. The quantum of direct evidence against petitioner was as great as in *Harrington* v. *California*, 395 U.S. 250 (1969), while the improperly admitted evidence here is not so directly suggestive of guilt as in *Harrington*.

Petitioner on appeal makes much of the district court's statement that the question before the jury in this case was "whether the entire case of the prosecution was fabricated or whether the entire defense was fabricated". As the district court's opinion makes clear, and we agree, petitioner's credibility was so severely impaired by his own testimony, the testimony of some of the witnesses he called to the stand, and by the proper admission of two more recent felony convictions, that the effect of the three lesser convictions was surely inconsequential.

IV.

Petitioner's remaining contentions concerning his arrest and the police seizure of the $1700 at the station house can be easily resolved. The validity of his arrest has never been presented to any Massachusetts court, thus precluding federal court consideration thereof. *Needel* v. *Scafati*, 412 F.2d 761 (1st Cir. 1969), *cert. denied*, 396 U.S. 861 (1969); 28 U.S.C. § 2254.

Assuming that the arrest was valid, the police had the right to conduct a thorough search of his person at the station house. *United States* v. *DeLeo*, 422 F.2d 487, 492-

493 (1st Cir. 1970), *cert. denied*, — U.S. — (1970). Once the $1700 in cash was observed during that search, we cannot believe that the police were obliged to return such a large sum to the arrested petitioner before placing him in jail. *See, e.g., Charles* v. *United States*, 278 F.2d 386, 388 (9th Cir. 1960). Moreover, we discern no legitimate objection to the fact that the police contacted other authorities concerning any recent thefts of this amount of money.

These contacts led the police to Theofilopoulos, who identified petitioner as one of the robbers and mentioned the distinctive markings on the bill. Since the police at this point had proper custody of the money and now had reason to suspect that it was stolen, we discern no objection to the fact that it was shown to Theofilopoulos to determine whether the "76" marking which he had mentioned, which appeared on one of the bills taken from petitioner, was indeed the marking which Theofilopoulos had affixed.

Affirmed.

APPENDIX B

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States and subject to the jursidiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforece any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
SEP 30 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 629

WILLIAM M. GILDAY, JR.,
PETITIONER,

v.

PALMER C. SCAFATI,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. QUINN
Attorney General
JOHN J. IRWIN, JR.
Assistant Attorney General
Chief, Criminal Division
RUTH I. ABRAMS
Assistant Attorney General
Chief Appellate Section
HAROLD MAC VANE BROWN
Assistant Attorney General

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	2
Argument	6
I. The Admission of the Three Uncounseled Convictions Solely To Impeach the Defendant's Testimony Was Properly Found by the Court To Be "Harmless Beyond Reasonable Doubt."	6
II. In the Event That the Court Is of the Opinion That the "Harmless Error" Doctrine Was Improperly Applied, It Is Nevertheless Clear That the Use of "Uncounseled" Convictions Solely for Impeachment Is Not Within the Proscription of *Burgett*.	9
III. The *Burgett* Holding—to the Extent That It May Be Applicable to Prior Convictions Introduced for the Purposes of Impeaching Credibility—Should Not Be Applied Retrospectively.	10
Conclusion	11

TABLE OF CITATIONS

Cases

Abrams, In Re, 36 Ohio App. 384, 173 N.E. 312 (1930)	9, 10
Bloch v. *United States*, 226 F.2d 185 (9th Cir. 1955)	10
Burgett v. *Texas*, 389 U.S. 109	2, 6, 7, 9, 10, 11
Chapman v. *California*, 386 U.S. 18	6, 8
Chin Kee v. *Commonwealth of Massachusetts*, 407 F.2d 10 (C.A. 1, 1969)	6
Commonwealth v. *Bowden*, 351 Mass. 655 (1967)	2

	Page
Gideon v. *Wainwright*, 372 U.S. 335	6
Gilday v. *Commonwealth*, 1969 Mass. Adv. Sh. 718	2, 3, 10
Griffin v. *California*, 380 U.S. 609 (1965)	10
Hackett v. *Freeman*, 103 Iowa 296, 72 N.W. 528 (1897)	9
Hamilton v. *Alabama*, 368 U.S. 54	6
Harrington v. *California*, 395 U.S. 250	8
Johnson v. *New Jersey*, 384 U.S. 719 (1966)	11
Latikos v. *State*, 17 Ala. Supp. 655, 88 So. 47 (1921)	9, 10
Linkletter v. *Walker*, 381 U.S. 618 (1965)	11
Manning v. *State*, 7 Okla. Crim. Rep. 367, 123 P. 1029 (1912)	9, 10
People v. *Barney*, 89 Ill. App. 2d 186, 232 N.E. 2d 481 (1967)	9, 10
People v. *Braun*, 14 Cal. 2d 1, 92 P.2d 402 (1939)	9, 10
State v. *Crawford*, 60 Utah 6, 206 Pac. 717 (1922)	9, 10
State v. *Johnson*, 99 Ariz. 52, 496 P.2d 403 (1965)	9
Stovall v. *Denno, Warden*, 388 U.S. 293 (1967)	11
Sublisky v. *Commonwealth of Massachusetts*, 412 F.2d 691 (1st Cir. 1969)	10
Teban v. *United States, ex rel Shott*, 382 U.S. 406 (1968)	10
United States v. *Newman*, 331 F.2d 968 (8th Cir. 1964) *certiorari denied*, 397 U.S. 975 (1965)	9

Statutes

28 U.S.C. § 1254(1)	1
Massachusetts General Laws, c. 233, § 21	9

In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 629

WILLIAM M. GILDAY, JR.,
PETITIONER,

v.

PALMER C. SCAFATI,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the court of appeals is not yet reported. (Pet. App. A pp. 55-63) The memorandum opinion of the district court is not reported. (Pet. App. A pp. 14-54).

Jurisdiction

The judgment of the court of apeals was entered on June 24, 1970. The petition for a writ of certiorari was filed on September 1, 1970. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether the admission of three convictions (subsequently found to have been obtained in the absence of counsel) solely for the purpose of impeaching petitioner's credibility was properly found by the Court below to be harmless beyond a reasonable doubt?

2. Whether the rationale of *Burgett* v. *Texas*, 389 U.S. 109, prevents the use of "uncounseled" convictions used solely to impeach a criminal defendant's credibility?

3. Whether the rationale of *Burgett* applies to criminal trials conducted prior to the Court's decision, in which "uncounseled" convictions were used solely to impeach a defendant's credibility?

Statement of the Case

Petitioner was convicted in the Essex Superior Court of Massachusetts in March of 1964 for armed robbery on August 18, 1963, and sentenced to a term of from 15 to 25 years, to be served at the Massachusetts Correctional Institution at Walpole. Petitioner's conviction, and that of a co-defendant, Bowlen, were affirmed on appeal. *Commonwealth* v. *Bowlen*, 351 Mass. 655 (1967). After this Court's decision in *Burgett* v. *Texas*, 389 U.S. 109, one of the issues unsuccessfully raised on appeal, the use at trial of prior convictions obtained in the absence of counsel to impeach petitioner's credibility, was raised on a petition for a writ of error in the Supreme Judicial Court of Massachusetts. *Gilday* v. *Commonwealth*, 1969 Mass. Adv. Sheets 718. After a hearing on the merits before a single justice of the Supreme Judicial Court, the case was reserved and reported to the Full Bench. In a reseript opinion, the Full Bench reaffirmed the conviction on the ground that any error in admitting the prior convictions in evidence was "harmless

beyond a reasonable doubt." *Gilday* v. *Commonwealth*, *supra*.

A petition for habeas corpus was then brought in the United States District Court for the District of Massachusetts. The presiding judge, after reviewing the entire state court transcript of the trial and other state court proceedings, found that the admission of the "uncounseled" convictions for purpose of impeachment was "harmless beyond a reasonable doubt." (Pet. App. A pp. 14-54). The First Circuit affirmed. (Pet. App. pp. 55-63).

The Commonwealth's evidence showed that the robbery for which petitioner was convicted occurred on Saturday afternoon, August 17, 1963, in Haverhill, Massachusetts. The principal victim, one Theofilopoulos, operated a neighborhood variety store (Tr. 152, 153).[1] According to the victim and two customers who were present, Samoisette and White, petitioner, and second man later identified as Bowlen entered the store at about 6:30 p.m., and with drawn guns, robbed the proprietor of the contents of his wallet, the cash register, and two customers of lesser amounts (Tr. 160-161; 306; 370).

On the following afternoon, Sunday, August 18, 1969, petitioner was involved in an automobile accident in Middleton, Massachusetts (Tr. 75, 76). Shortly after the accident, the Middleton Police arrived on the scene (Tr. 17). Petitioner and the police stayed at the accident scene until approximately 5:45 p.m., at which time petitioner was placed under arrest for driving a motor vehicle without having a driver's licence in his possession, and other charges (Tr. 23, 55, 56, 57, 121, 126). After hospital treatment for injuries suffered in the accident (Tr. 24), petitioner was taken to the Danvers Police Station, which is used as a lockup by the Middleton Police (Tr. 25). He

[1] References are to the Hearing on the Motion To Suppress ("M. Tr.") and the trial transcript (Tr.).

arrived at the police station about 6:30 p.m., where he was booked and subjected to a search. The search revealed that he had approximately $1,700 in currency in his pockets (M. Tr. 25, 26, 27). The cash and some other items of personal property were retained by the Middleton Police (Tr. 26).

The Middleton police notified the Haverhill police of the discovery of the large sum of money in petitioner's possession (M. Tr. 29, 30). A Haverhill police inspector contacted the main victim, Theofilopoulos, and drove him to the Danvers Station (Tr. 495). He did not tell Theofilopoulos about the money which had been found in petitioner's pockets (Tr. 499). On the night of the holdup, Theofilopoulos had told the Haverhill Police that he had written the figure "76" with a red ballpoint pen on one of the bills taken from him by the robbers (Tr. 512). Upon arriving at the station, the victim observed petitioner, who was alone in a room at the time, and identified him as one of the robbers (Tr. 497, 498). Thereafter, the victim and the officer examined the money which had been taken from petitioner's pockets. They found among it the bill with the distinctive marking, and the victim also found approximately the same number of large bills as had been taken from him the previous afternoon (Tr. 508, 509, 510).

Other prosecution evidence included testimony by one Mrs. Vlohos that she had seen petitioner, on August 17, 1963, at approximately the time of the robbery, get into a car near Theofilopoulos' store and sit in it for three or four minutes before being joined by a man later identified as Bowden (Tr. 437, 438, 439, 440). Mrs. Vlohos' description of petitioner as wearing distinctive, wraparound style sunglasses, corroborated a description of petitioner given by witnesses who were in the store at the time of the robbery (Tr. 166, 167, 309, 310, 311, 370, 439, 440). A pharmacist, Aronson, testified that, during the early afternoon of August 18, 1963, petitioner visited his store and, in his

presence, counted the currency in his pockets, reaching a total of somewhat in excess of $1,700; that before leaving the store, petitioner inspected the sunglasses on display at a rack and tried some of them on, but did not buy any; and that, after petitioner had left the store, he found near the sunglasses, a pair of wraparound sunglasses which matched generally the description given by witnesses to the robbery (Tr. 89, 94, 95, 96, 97). Later that same afternoon, when petitioner drove his automobile off the highway, a motorist, coming to his aid, asked him if he was hurt, and petitioner replied that he was not. The motorist then asked, "Well, you want me to call the police, or a wrecker?" Petitioner replied, "Well, you might just as well, because I'm done for now." (Tr. 77).

B. Petitioner took the stand in his own defense. Toward the end of petitioner's testimony on cross-examination, the prosecuting attorney elicited admissions from him that he was the same Gilday who had been convicted of five previous offenses, as follows: (a) on February 14, 1955, attempted theft of a handbag, resulting in a sentence of 4 to 5 years at Massachusetts Correctional Institution at Walpole (Tr. 671), (b) on February 14, 1955, while armed with a rifle, robbery from the person of a different individual of $40, resulting in a 10 to 20 year sentence at the same institution (Tr. 672), (c) on March 20, 1954, assault and battery, in the Second District Court of Essex at Amesbury, Massachusetts, with a sentence of 3 months, suspended, and probation for one year (Tr. 672), (d) on August 5, 1953, in Municipal Court for the City of Duluth, Minnesota, carrying concealed weapons, resulting in a sentence of 30 days at the County Jail and weapons ordered confiscated (Tr. 673) and (e) on September 12, 1951, in Court of Common Pleas, Greene County, Ohio, breaking and entering into a sporting goods store in the nighttime and stealing certain pistols, shotguns, revolvers and mis-

cellaneous sporting goods of value of $2,060, at Fairborn, Ohio, resulting in a sentence of probation for one year (Tr. 673). Petitioner did not object to the introduction of convictions (a), (b), and (c). He objected and excepted to the admission of (d) and (e). In prior proceedings (c), (d), and (e), he had not been represented by counsel.

Argument

I. The Admission of the Three Uncounseled Convictions Solely to Impeach the Defendant's Testimony was Properly Found by the Court to be "Harmless Beyond Reasonable Doubt."

Petitioner does not challenge the factual findings made by the Courts below. Defendant's only contention before this Court is that the "harmless error" doctrine can not be applied to any situation involving the use of constitutionally infirm convictions. (Pet. App. p. 3 n.1) The Supreme Judicial Court of Massachusetts and the First Circuit disagreed.

In *Chapman* v. *California*, 386 U.S. 18, 23-24, this Court said that error — even constitutional error — does not require automatic reversal of a conviction where it was harmless beyond reasonable doubt. We are aware of no cases which have departed from this view.

Although it has been held that violation of the right to counsel (*Gideon* v. *Wainwright*, 372 U.S. 335) can never be harmless (See *Chapman* v. *California*, Supra at 23 n.8), the absence of counsel at certain stages of a trial has been found to be harmless, indicating a reluctance to adopt the "per se" approach of *Gideon* to every situation involving the right to counsel. *Cf. Hamilton* v. *Alabama*, 368 U.S. at 54 n.4, see also *Chin Kee* v. *Commonwealth of Massachusetts*, 407 F.2d 10 (C.A. 1, 1969) cert. denied, 395 U.S. 982.

This case involves the use of "uncounseled" convictions solely to impeach the petitioner's credibility. *Burgett* v.

Texas, 389 U.S. 109 involves their use in a one stage recidivist trial to enhance the penalty provided upon conviction. There is no suggestion in *Burgett* that the Court's refusal to find "harmless error" represented adoption of the "per se" approach to such violations.

Petitioners suggestion that a "burgeoning conflict" exists between the various Courts of Appeal is entirely without merit. Those circuits alleged to have concluded that *Burgett* errors are not subject to "harmless error" analysis have not yet found it necessary to reach that question. Moreover, the First Circuit is the only circuit to determine that the rationale of *Burgett* applies to situations where "uncounseled" convictions are introduced solely for impeachment purposes.

We believe, as did the Court below, that. . . "a violation of *Burgett* simply does not necessarily pervade and distort the entire proceeding in the same manner that ... the denial of counsel at the trial in question does." (Pet. App. AP. 59)

The evidence adduced at the trial clearly established petitioner's guilt. He was identified by several eyewitnesses as one of the robbers having a gun. While petitioner testified that he entered the store at 5 p.m., two witnesses, whom he called, although not able to identify petitioner as one of the participants, were certain that the armed robbery had occurred around 6:30 p.m., and were able to identify co-defendant Bowlen. Petitioner admitted having been with Bowlen throughout the times in question. At the time of his arrest, on the day following the robbery, petitioner had on his person approximately the same amount of cash as had been stolen. One of the bills on his person, bearing the distinctive "76" marking, was readily identified by the victim Theofilopoulos as having been stolen from him. On the night of the holdup, the victim had told the Haverhill Police that he had written

the figure "76" with a red ballpoint pen on one of the bills taken from him by the robbers. The witness Aronson testified that petitioner, in the early afternoon of the day following the robbery, had, in his presence, counted the currency in his pockets, reaching a total in excess of $1,700 and that the petitioner left behind in Aronson's store when he departed, a pair of wraparound sunglasses which matched the description of those worn by petitioner according to witnesses at the robbery. Later that same afternoon, when petitioner drove his automobile off the highway in Middleton, witness Allen, coming to his aid, asked him if he was hurt, and petitioner replied that he was not. Allen then asked, "Well, you want me to call the police, or a wrecker?" Petitioner replied, "Well you might just as well, because I'm done for now." This admission, coupled with the evidence summarized above, clearly supports a finding of petitioner's guilt. A factor for the court's consideration in determining harmlessness of error is overwhelming evidence of guilt. *Harrington v. California*, 395 U.S. 250, 254-55. On the other hand, the "uncounseled" convictions had a minimal effect on petitioner's credibility. More specifically, the Court below stated

> . . .Petitioner's credibility was so severely impaired by his own testimony, the testimony of some of the witnesses he called to the stand, and by the proper admission of two more recent felony convictions, that the admission of the three uncounseled convictions for purposes of impeachment was surely inconsequential." (Pet. App. A, P. 62)

Unless this Court will now. . . "adopt the minority view in *Chapman* (386 U.S. 42-45) that a departure from constitutional procedures should result in an automatic reversal, no matter the weight of evidence", the conviction of Petitioner should be left undisturbed.

II. In the Event That the Court is of the Opinion That the "Harmless Error" Doctrine Was Improperly Applied, it is Nevertheless Clear That the Use of "Uncounseled" Convictions Solely For Impeachment is Not Within the Proscription of *Burgett*.

This Court has never held that it is constitutional error to introduce "uncounseled" convictions for the purpose of impeaching credibility. Every Court of Appeal case cited by petitioner concerned the effect of an "uncounseled" conviction relied upon by the prosecution to increase the penalty provided in a "recidivist" trial. No such scheme is involved here. Massachusetts Law explicitly limited the admissibility of prior convictions to impeachment purposes. See Massachusetts General Law, Chapter 233 §21. It seems clear to us that considerations, apart from speculative effect on the fact finding process, are involved here. In this regard, the present case is analogous to those dealing with the admissibility of prior convictions—for purposes of impeachment—which are pending on appeal. A majority of state and federal jurisdictions have concluded that prior convictions—even though they are pending on appeal—are valid "unless and until" they are set aside or reversed, and that such convictions are therefore admissible for purposes of impeachment. *State* v. *Johnson*, 99 Ariz. 52, 496 P.2d 403 (1965); *Hackett* v. *Freeman*, 103 Iowa 296, 72 N.W. 528 (1897); *Manning* v. *State*, 7 Okla. Crim. Rep. 367, 123 P. 1029 (1912); *People* v. *Barney*, 89 Ill. App. 2d 186, 232 N.E. 2d 481 (1967); *Latikos* v. *State*, 17 Ala. Supp. 655, 88 So. 47 (1921); *People* v. *Braun*, 14 Cal. 2d 1, 92 P.2d 402 (1939); *In Re Abrams*, 36 Ohio App. 384, 173 N.E. 312 (1930); *State* v. *Crawford*, 60 Utah 6, 206 Pac. 717 (1922); *United States* v. *Newman*, 331 F.2d 968 (8th Cir. 1964), certiorari denied, 379 U.S. 975 (1965);

Block v. *United States*, 226 F.2d 185 (9th Cir. 1955). Indeed, the prevailing rule is that the same rule obtains even if the prior conviction is subsequently reversed by the appellate Court. *People* v. *Barney*, *supra*; *Bloch* v. *United States*, 238 F.2d 631 (9th Cir. 1959); see also, *Latikos* v. *State*, *supra*; *People* v. *Brau*, *supra*; *Manning* v. *State*, *supra*; *In Re Abrams*, *supra*; and *State* v. *Crawford*, *supra*. Unless prior convictions have been vacated by a court of competent jurisdiction their admission for the limited purpose of impeachment is not within the proscription of *Burgett*.

III. The Burgett Holding—to the Extent That it May be Applicable to Prior Convictions Introduced for the Purposes of Impeaching Credibility—Should Not be Applied Retrospectively.

The Supreme Judicial Court in *Gilday* v. *Commonwealth*, *supra*, ruled that in the future no prior conviction obtained in the absence of counsel shall be used for purposes of impeachment unless it can be shown that the witness "had or waived counsel in the proceedings certified by the record." But, whatever may be the impelling reason for the *Burgett* doctrine, *Burgett* should clearly not be applied retrospectively because of the undue burden it would impose upon the administration of criminal justice in the Commonwealth of Massachusetts, and elsewhere. See *Sublisky* v. *Commonwealth of Massachusetts*, 412 F.2d 691, 692 (1st Cir. 1969).

In refusing to give the "no comment rule" of *Griffin* v. *California*, 380 U.S. 609 (1965) retrospective application in the case of *Tehan* v. *United States ex rel Shott*, 382 U.S. 406 (1968), the Supreme Court of the United States indicated that their refusal to do so was based upon the ". . .impact upon the administration of their (referring

to the states) criminal law so devastating as to need no elaboration." 382 U.S. at 419. See also *Linkletter* v. *Walker*, 381 U.S. 618, 636 (1965); *Johnson* v. *New Jersey*, 384 U.S. 719, 729 (1966); *Stovall* v. *Denno, Warden*, 388 U.S. 293, 297 (1967). To say collateral attacks are permissible on convictions obtained prior to when the *Burgett* case was decided (November 13, 1967) would raise doubts as to the validity of the thousands of convictions in cases where the defendant took the witness stand and was impeached by use of prior conviction. The result would undoubtedly mean that the courts of the Commonwealth, as well as other states, would be clogged with challenges, most of which would be altogether specious and render successful retrials in most cases impossible due to the unavailability of witnesses and evidence due to the passage of time. Respondent, therefore, respectfully submits that the *Burgett* rule should not be applied retrospectively to the instant case.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT H. QUINN
Attorney General
JOHN J. IRWIN, JR.
Assistant Attorney General
Chief, Criminal Division
RUTH I. ABRAMS
Assistant Attorney General
Chief, Appellate Section
HAROLD MAC VANE BROWN
Assistant Attorney General